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Supreme Court of the United States

OCTOBER TERM 1943

No. 51

LONNIE E. SMITH, PETITIONER

v.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,
Respondents.

BRIEF OF GERALD C. MANN. ATTORNEY GENERAL OF TEXAS AS AMICUS CURIAE.

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To the Honorable Supreme Court:

Now comes Gerald C. Mann, Attorney General of Texas, leave of this court first having been obtained, and files this his amicus curiae brief in the above cause. He shows to the court that while the Democratic Party in Texas is purely political, and that as Attorney General he is not authorized to represent the party as such. The question involved in this litigation however is of such importance to the citizenship of Texas and to the preservation of the purity of the ballot in primary elections, that as Attorney General of Texas, he feels that it is his duty to file this brief.

He shows to the court that by reason of the far-reaching effect of the questions involved, and by reason of the fact that the respondents have not filed any brief in this court or appeared, that the question should be argued orally, and he has therefore requested permission of this court to argue same at such time as is convenient to the court.

The two major questions that are necessary to be determined in this litigation are:

POINT ONE: Is an election judge who conducts or holds a primary election for a political party in Texas a State officer?

POINT TWO: Have the white Democrats in Texas, or any other political group in Texas, the right to determine who, or what class of people or voters shall constitute the party they desire to organize?

PRELIMINARY STATEMENT

It is now well recognized in practically every state of the Union that in order to maintain a Democratic form of government, it is necessary to have political parties, which in turn select candidates for office from the President of the United States down to the smallest office-holder in the respective states.

In practically every state stringent laws have been enacted regulating these primary elections, or nominating conventions, in order to eliminate as far as

possible corruption and get the free, full and fair expression from those who constitute the particular party seeking to nominate or select its candidates for the respective offices.

Looking toward this end, the Legislature in Texas in 1903 passed its first full and complete primary election law. This law was entirely rewritten in 1905, and since that time has been amended in many respects to meet the contingencies and conditions that have arisen by reason of certain groups seeking to corrupt the ballot box in the primary election or nomination conventions.

So far as we have been able to ascertain the courts have never held that they had the right to determine who would or would not compose a particular political organization. Under the Constitution of the United States, as well as the Bill of Rights in Texas, citizens of the State have always had the privilege to create any kind of an organization they desired which does not violate the law.

POINT ONE (restated): Is an election judge who conducts or holds a primary election for a political party in Texas a State officer?

ARGUMENT AND AUTHORITIES UNDER POINT ONE

The highest courts in Texas have definitely held that the Chairman of the County Democratic Execu-

tive Committee is not an officer within the terms and definitions of the Constitution and laws of the State of Texas. Article 3101 of the Revised Statutes of Texas provides for the holding of a primary election to be held by each organized political party that casts more than one hundred thousand votes in the last general election to nominate candidates for all offices to be filled at the general election. The effect of this statute unquestionably was and is to require political parties in Texas which have sufficient strength to have cast as many as one hundred thousand votes in the preceding general election to nominate its candidates if any or desired by a primary election. This law was evidently passed to prevent a small group within such political party from meeting in a convention and nominating such officers.

Article 3104 of the Revised Statutes of Texas provides that the primary election shall be conducted by a presiding judge to be appointed by a Chairman of the County Executive Committee of the party, with the assistance and approval of at least a majority of the members of the County Executive Committee. The presiding judge is then authorized to select his associate judge and clerks.

In order that peace may be preserved and no disturbing element prevent the election from being held in an orderly manner, Article 3105 of the Revised Statutes gives to the judges of the primary election authority to maintain peace and order, and if necessary, arrest any person causing disturbance within one hundred feet of the election polling place.

Article 3105 of the present statute is in the exact language of Article 3090 of the Revised Statutes of Texas of 1911, and was passed by the Legislature in 1905.

In 1907 the Court of Criminal Appeals in Texas, which is the court of last resort in criminal matters, in the case of *Ex parte Anderson*, 51 Tex. Cr. R. 239, 102 S. W. 727, passed directly upon the question as to whether the County Chairman of the Democratic Executive Committee was an officer under the provisions of the Texas Constitution and law. In said case it appears that a prohibition election had been held, and the presiding judge at one of the largest voting boxes was the chairman of the Democratic Executive Committee. The contention was made that the election was void because of said fact. In overruling this contention, the court used the following language:

> "Relator insists that the local option law is invalid because the presiding judge of the voting precinct No. 2 in the local option election was at the time of holding of said election an officer of trust under the laws of this state, to-wit, was chairman of the Democratic executive committee, having been theretofore elected to said office at the primary election held in said county on July 28th. The insistence is that he was thus holding two offices of profit and trust. We do not think there is anything in this contention. To be chairman of the Democratic executive committee for the county was not an office of profit and trust within the contemplation of the laws of this state. * * * ."

In the case of *Walker* v. *Mobley*, 101 Tex. 28, 103 S. W. 490, the Supreme Court of Texas definitely passed upon the question as to whether the County Chairman of the Democratic Executive Committee of a particular county was an officer, within the purview of our Constitution and law, and held specifically that he was not, and in so doing, used the following language:

> " * * * . The ground of disqualification urged is that the chairman of an executive committee of a political party is an officer of the state or county. There is nothing in the language of the law or the Constitution to support the contention. Dean (who was chairman of the county Democratic executive committee) was not disqualified to act as judge of the (prohibition) election."

The same question came before the Court of Civil Appeals in Texas in case of *Walker* v. *Hopping*, 226 S. W. 146, and no application for writ of error was made in said case. The Court of Civil Appeals at Amarillo in said case in holding that the members of the Democratic County Executive Committee were not state officers used the following language:

> "(3) Appellant first advances the proposition that the executive committeemen provided for by this article of the statute are officers within the provisions of article 16, § 17, of the Constitution, reading:
>
> "'All officers within this state shall continue to perform the duties of their offices until their

successors shall be duly qualified.'

"We think that the term 'officers,' referred to in the Constitution, has reference to public or governmental officers, and that the officers of a political party, although provided for by statutory law, are not to be regarded as public or governmental officers. Coy v. Schneider, 218 S. W. 479; Waples v. Marrast, 108 Tex. 5; Walker v. Mobley, 101 Tex. 28. A reference to the decisions cited, we believe, will render a further discussion of this proposition superfluous."

In *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180, the Supreme Court of Texas held unconstitutional that portion of the primary election law in Texas which required the various counties to pay the expenses of said primary elections. In said opinion the court reviewed at length the entire primary election law. It held specifically that the nomination by political parties of their officers was not a State business, and could not, therefore, be paid for with State money, and we think in effect definitely held that the officers of a political party were not in any sense of the word officers of the State. The court used the following language:

(6) * * * "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord

with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. * * *.

"The great powers of the State,—and the taxing power is the one to be always the most carefully guarded,—cannot be used, in our opinion, in aid of any political party or to promote the purposes of all political parties. * * *.

"To provide nominees of political parties for the people to vote upon in the general elections is not the business of the State. It is not the business of the State because in the conduct of the government the State knows no parties and can know none. If it is not the business of the State to see that such nominations are made, as it clearly is not, the public revenues cannot be employed in that connection. * * *. Political parties are political instrumentalities. They are in no sense governmental instrumentalities."

While petitioner seeks to minimize the opinion of

this court in the case of *Grovey* v. *Townsend*, 295 U. S. 45, on the theory that the facts were not developed in that case, we submit that the entire question as to whether the election judge is a State officer was fully and definitely settled by this court. The primary election law in Texas has not been in any way changed or modified since said opinion was written. The opening sentence on page 48 of the Grovey v. Townsend opinion reads:

> "The charge is that respondent, a state officer, in refusing to furnish petitioner a ballot, obeyed the law of Texas, and its consequent denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution."

After discussing said proposition at length, and citing numerous authorities from the State of Texas, this court on page 53 of said opinion, used this language:

> "In the light of the principles so announced, we are unable to characterize the managers of the primary election as State officers in such sense that any action taken by them in obedience to the mandate of the State convention respecting eligibility to participate in the organization's deliberation, is the State action."

While it is true the Legislature in Texas has attempted to throw every safeguard around primary elections held by any and all political parties who seek to nominate candidates for office, in order to

preserve the purity of the ballot, the Texas Legislature has not attempted to control who must be the members of any political branch or party. It did attempt to pay the expenses of primary elections, but as before stated, our courts held under our Constitution the Legislature could not do so.

POINT TWO (restated): Have the white Democrats in Texas, or any other political group in Texas, the right to determine who, or what class of people or voters shall constitute the party they desire to organize?

ARGUMENT AND AUTHORITIES UNDER POINT TWO

As we construe same, it is petitioner's contention that a political party in Texas cannot determine who shall be a member thereof. We submit this proposition is not tenable. To say that any group of citizens cannot lawfully assemble and organize a political party for the purpose of nominating candidates for office would be to deprive them of the inalienable right given under the First Amendment to the Federal Constitution as well as Sec. 27 of the Bill of Rights in the State of Texas. On page 29 in the brief filed herein by petitioner, he states there are now in Texas 540,565 adult Negro citizens. If these Negro citizens in Texas desire to organize a political party, petitioner would not, we are confident, argue that they could not do so. Neither would this court, we are constrained to believe, hold that they could not organize a political party in the State of Texas,

and exclude from said Party all persons except Negroes.

We have in Texas approximately 400,000 Mexicans. Unquestionably, under their constitutional rights, they are entitled to organize a political party to be composed entirely of Mexicans, and no one would, we think, contend that they did not have this inalienable constitutional right.

We have in Texas some 300,000 Republican voters, who are adherents to and believers in the principles of the Republican party. While this number is not sufficient to elect officers in most districts or precincts of the State, no one would contend that they are not entitled to create a political party and limit their membership to Republicans.

By the same token and reason there cannot, we submit, be any reason why the white Democrats in Texas may not organize for themselves a political party in Texas. Whether this is wise is not a question for the courts to determine, and we submit is a matter over which the courts cannot within the Constitution exercise or control their actions. For the courts to say that any group of citizens cannot meet peacefully and quietly and nominate candidates for political offices would be to deny them the inalienable rights for which our forefathers fought and the principles upon which this Government is founded.

The above general principles, we think, have been

definitely settled by the decisions of the Supreme Court, as well as by the courts of last resort in Texas. This court in *Grovey* v. *Townsend*, supra, stated:

> "Fourth. The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the primary election of July 9, 1934, and that in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that a Negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him this suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the State need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of their race or color is prohibited by the Federal Constitution."

In the case of *Drake* v. *Executive Committee of the Democratic Party*, 2 Fed. Supp. 486, the District Court in Texas held that the Democratic party in Houston could exclude Negroes from voting in the primary election to nominate city officers, and used this language:

"(4, 5). This then brings forward the question of whether, in the absence of a controlling statute of the state, a political party in Texas, acting through its convention, committee, or otherwise under party rules and regulations, has inherent power to prescribe the qualifications of its members. I think this must be answered in the affirmative, Nixon v. Condon, 49 F. (2d) 1012, White v. Democratic Executive Committee, 60 F. (2) 973, and that the action of defendant, city executive committee (acting not under powers derived from the state, and not as an agency of the state, but presumably in accordance with rules and regulations of the Democratic Party), in so denying plaintiff the right to vote in such primary election, does not violate plaintiff's rights under the Fourteenth Amendment."

In the case of *Bell* v. *Hill*, 123 Tex. 531, 74 S. W. (2) 113, the State of Texas, speaking through its then Chief Justice, Judge Cureton, discussed at length the organization of political parties, what they were, and their functions, and the power of a political convention to determine its membership, and to restrict its membership to white citizens. The case involved a mandamus, wherein the petitioners, Bell and Jones, who were Negroes, sought a mandatory injunction against the members of the Democratic Executive Committee in Jasper County to require them to permit the petitioners to vote in the Democratic primaries in 1934. The court used this language, beginning with the last paragraph on column 1, p. 119, 74 S. W.

"We come now to the constitutional basis of

political parties, as well as other voluntary associations. That basis is found in the first section of the Bill of Rights, the First Amendment to the Constitution of the United States, which declares: 'CONGRESS SHALL MAKE NO LAW respecting an establishment of religion, or prohibiting the free exercise thereof; or ABRIDGING the freedom of speech, or of the press; or the RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.'

" * * *

"In United States v. Cruikshank, 92 U. S., 542, the Supreme Court of the United States, in an opinion by Chief Justice Waite, declared: 'The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.'

"Section 27 of the Bill of Rights, art. 1, Constitution of Texas, reads: 'The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.'

"The applicability of this section of the Bill of Rights to political associations is made manifest when we consider section 2 of the Bill of Rights, which declares: 'All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.'

" * * *

"(3, 4) Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the power of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances be conferred upon a state or governmental agency.

" * * *

"(8) * * *. There is no limitation contained in article 3167 with reference to declarations of

policy by a State Democratic Convention called for the purpose of electing delegates to a National Gonvention. Necessarily such convention has the same power and authority to determine the membership of the party as any other State Convention of the party would have. The statute does not in any way attempt to limit the power of such Convention; and, indeed, under our view of the Bill of Rights, the Legislature could not limit its power with reference to either policies or membership. A National Party Convention necessarily formulates a platform and policies, and if the will of a state party is to be made known to a National Convention, it necessarily has the power to formulate its policies and define its membership."

In *Scurry* v. *Nicholson*, 9 S. W. (2) 747, the Court of Civil Appeals in holding that a political party could determine its membership and fix its policies stated:

"(4-6) We think it must be conceded that, in the absence of some legislative interdict, that the Democratic executive committee of any single county may properly enforce a rule or regulation prescribed and enforced by the supreme powers of the organization, and it is common knowledge, of which we may take judicial notice, that, in the late state Democratic convention, that body unhesitatingly refused to recognize and ousted delegates from a number of counties, including Tarrant county, who had avowed their purpose of supporting the nominees of the Republican Party for President and Vice President. It is likewise so known to us that the Democratic executive committee of the nation

peremptorily ousted and named another in place of a member of the national Democratic executive committee from the same county on the same ground. * * * ."

In *White* v. *Lubbock*, 30 S. W. (2) 722, the Court in discussing the power of the Democratic Party to determine who should vote in its primary elections, used the following language:

"(3-5) In a state like Texas, where the political parties have not by law been made either to perform any governmental function or to constitute any governmental agency by the payment by the State of their expenses of operation, or otherwise, but have only been regulated—however elaborately—as to how they shall elect their nominees (Waples v. Marrast, 108 Tex. 5), they are not state instrumentalities, but merely bodies of individuals banded together for the propagation of the political principles or beliefs that they desire to have incorporated into the public policies of the government, and as such have the power, beyond statutory control, to prescribe what persons shall participate as voters in their conventions or primaries; in no event, therefore, did the inveighed-against course of both the state and Harris county managers of the Democratic Party of Texas in so barring all but white Democrats from its primaries constitute action by the State of Texas itself that was interdicted by the invoked provisions of the National Constitution, but only the valid exercise through its proper officers of such party's inherent power (recognized but not created by R. S. article 3107) to determine who should make up the membership of its own private household. * * * ."

In *Love* v. *Buckner*, 121 Tex. 369, 49 S. W. (2) 425, the Supreme Court of Texas held that the Democratic State Executive Committee was authorized to require the voters to take the specific pledge to support the nominees of the Democratic party for President and Vice-President before they could vote in the Democratic convention held to elect delegates to the national convention and used this language:

> "We do not think it consistent with the history and usages of parties in this state nor with the course of our legislation to regard the respective parties or the State Executive Committee has denied all power over the party membership, conventions, and primaries, save where such power may be found to have been expressly delegated by statute. On the contrary, the statutes recognize party organizations including the State committees, as the repositories of party power, which the Legislature has sought to control or regulate only so far as was deemed necessary for important governmental ends such as purity of the ballot and integrity in the ascertainment and fulfillment of the party will as declared by its membership. * * *
>
> "It is true the statute forbids participation in the precinct primary conventions of those who are not certified qualified voters, but the only voters referred to throughout the Article as comprising the precinct primary convention, and who can determine the real and effective party decisions are the voters of said political party."

Petitioners in their brief make the statement that

any white citizen of Texas can vote in the Democratic primary election, basing this statement, we presume, upon the testimony of Mr. Allwright, one of the respondents, who was the election judge in the precinct in which the petitioners offered to vote, wherein Allwright testified that if any white citizen came to the polls and offered to vote he himself did not question them, but permitted them to vote.

Article 3109 of the Revised Statutes of Texas provides that in all general primary elections there shall be an official ballot prepared by the party holding same.

Article 3110 of the Revised Statutes of Texas provides specifically that the official ballot may have printed thereon the following primary test: " 'I am a (insert name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary,' and any ballot which shall not contain such printed test above the names of the candidates thereon shall be void and shall not be counted."

We submit that under the authorities above cited the election judge has the right to presume that a man who presents himself as a voter is in fact a member of the Democratic party and will support its nominees, and that no one who is a Republican or who is affiliated with any other political party will offer to vote. If any voter's right to vote is challenged on the ground that he is not a member of the party, then the judge can refuse to permit the vote

to be cast unless the voter will take the required pledge.

In *Love* v. *Buckner*, 49 S. W. (2) 426, the court at page 426, column 1, stated:

> "In our opinion, a voter cannot take part in a primary or convention of a party to name party nominees without assuming an obligation binding on the voter's honor and conscience. Such obligation inheres in the very nature of his act, entirely regardless of any express pledge, and entirely regardless of the requirements of any statute. * * * Being unenforcible through the court, the obligation is a moral obligation. Westerman v. Mims, 116 Tex. 371.
>
> "The opinion in Westerman v. Mins quoted with approval the decision of the Supreme Court of Louisiana in the case of State Ex rel v. Michel, Secretary of State, 46 So. 430, to the effect that 'the voter by participating in a primary impliedly promises and binds himself in honor to support the nominee, and that a statute which exacts from him an express promise to that effect adds nothing to his moral obligation and does not undertake to add anything to his legal obligation. The man who cannot be held by a promise which he knows he has impliedly given will not be held by an express promise.'"

As is revealed by a number of the opinions of the Supreme Court of Texas, hereinabove referred to and quoted from, unquestionably the Democratic party in Texas can exclude from participation in its primary election all voters who refuse to take the

pledge of allegiance to the party, or who refuse to support the nominee of the primary election or convention at the general election to be held thereafter. Whether the party exercises this right or privilege is of no concern to the petitioners in this case. It is true, however, as is shown by the cases hereinbefore quoted from, that the Democratic party in Texas has definitely passed resolutions restricting its membership to those white citizens who are Democrats and who are willing to take a pledge, to support the nominees of the convention or primary election.

GROVEY V. CLASSIC CASES

While we do not consider it necessary to attempt to reconcile the opinions of this court in the case of *Grovey* v. *Townsend*, 295 U. S. 45, and *United States* v. *Classic*, 313 U. S. 299, we submit that the facts in the two cases are so different that the opinion in one does not necessarily control the opinion in the other case.

The primary question determined in the *Grovey* v. *Townsend* case was that an election judge holding the primary election in Texas for the Democratic party was not a state officer, and that the Democratic party could for itself determine the kind and class of voters that could participate in the Democratic party, without violating the Federal Constitution or the Constitution of the State of Texas.

In the case of *United States* v. *Classic* it appears

the State of Louisiana had made the primary election law a state matter, paid for by the State, and controlled by the State, and it was charged that one of the election judges holding said primary election counted votes cast for a candidate for Congress for another and entirely different candidate. By reason of this alleged open fraud and violation of law, the election judge was indicted under the Federal criminal statutes, and this court held that in such an election, in order to maintain the purity of the ballot, the election judge could not claim immunity by reason of the fact that the election being held in which he fraudulently and criminally counted ballots was a Democratic primary.

While it is not necessary to determine the question, it may be that in a Democratic primary held in Texas, or a Republican primary held in any state where the nomination of the party candidate as a matter of history results in the election of such candidate, (said primary election being held under the laws of the respective state governing same), if the election judge should fraudulently, deliberately and criminally count ballots cast for one candidate for Congress for another candidate and thereby defeat the nomination of a particular candidate for Congress, the judge could be prosecuted under the Federal statutes. This question is not before the court in the case at bar, and therefore need not be determined.

In Texas the State has not attempted to control who may organize a political party. It has passed

most stringent laws regulating any and all political parties with reference to the manner of holding primary election or conventions for the nomination of candidates for the respective offices, including Presidential electors, Senators, Congressmen and all State officers. The State of Texas is not interested in who constitutes a party, or what class of citizens may become members of any particular party. It is interested, of course, in maintaining the purity and integrity of the ballot or elections held by any party.

Article 1, section 2, and Article 17 of the Constitution of the United States secures to the citizens of the several States who are "qualified electors for the most numerous branch of the state legislature" the right to choose the state's representatives to the Congress.

Petitioners contend that these provisions secure to such qualified electors the right to participate in the procedure by which members of a private political organization choose its candidates, at least where the party's candidates are almost invariably elected.

The Attorney General submits that this contention is both unsound and untenable.

It is familiar doctrine that provisions in the Constitution preserving to the people certain rights and privileges were designed to render such rights and privileges immune from denial or abridgment by governmental action. Before placing a construction

on the provisions involved in this case which assumes a purpose to grant a right immune from private abridgment, it is proper, we think, to consider the extremes to which such construction must inevitably lead. Since the problem of construction is to ascertain the intent, we must be prepared to hold that the inevitable consequences of a particular construction were intended, else we are not at liberty to adopt the construction.

The Constitution prescribes the qualifications of those to whom it gives the right to choose the state's representatives to the Congress. Those qualifications must be the same as those required by the State to render them "qualified electors for the most numerous branch of the state legislature." If those possessing such qualifications are accorded by the Constitution the right to participate in the procedure for selecting candidates established by a private political organization, indisputably such private political organization may not prescribe other or different qualifications as a prerequisite to the exercise of the right. Such organization may not accord the right only to qualified electors who entertain certain political beliefs, denying it to qualified electors who espouse a different set of political principles.

The effect is to deny to those "qualified electors" holding certain political beliefs in common the right to organize and select candidates to advocate those beliefs. For, if participation in the procedure cannot be restricted to those of common political ideals,

there can be no assurance that the candidates nominated will represent those ideals.

The nomination for election of candidates espousing a particular set of political principles is the essential function of the political party. To give the Constitution the construction contended for by petitioners is to declare that the people intended to prohibit the organization of political parties, by the adoption of that instrument.

Further, we desire to call to the attention of the Court the provisions of Section 2 of Article 14 of the Constitution. This section declares that when the right to vote at any election for the choice of electors for President and Vice-President, or representatives to the Congress, is denied to any of the male inhabitants over twenty-one years of age, the basis of State representation in Congress shall be reduced "in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

If a private political party in a state is invariably successful in procuring the election of its candidates and through private action of its membership excludes large numbers of "qualified electors" from participation in the party procedure for selecting its candidates, is the State subject to the penalty prescribed in Section 2 of Article 14? If such "qualified electors" have a Constitutional right to participate in the party procedure, it would seem so. Certainly if a party primary is an "election" within the

meaning of Constitutional provisions granting the right to vote, it is an "election" within the meaning of those provisions prescribing a penalty for denying that right.

The result would be, if we are correct in this assumption, that the people in adopting the Constitution intended that the representation of a State in the Congress should be subject to reduction on account of purely private action of a part of its citizens.

The extremes to which an adoption of the construction contended for by petitioners lead, we think, demonstrate the fallacy of their argument.

If the Constitution secures the right contended for by petitioners, the right is of a most peculiar character, and it is most difficult to determine when and under what circumstances it comes into being.

It seems to be urged that the right to participate in the party procedure exists where the party is always successful in procuring the election of its candidates. At what stage of the political life of a party would this "right" come into existence? Will success on the first occasion after the organization of the party give rise to the right, or must there be a longer period of gestation? If, after a long period of success, the party loses an election, is the right lost? For what period does it remain dormant; how much success, after a loss, does it take to revive the right? If a party is always successful in State-

wide elections, but not in particular district elections, does the "qualified elector" have the right to participate in the primary for the selection of candidates for the State-wide election but not for the selection of candidates for the district election?

Conceding the invariable success of the "Democratic" party, over a long period of years, how is it to be determined that the party is the same through that period? Is the test of party identity the mere "party label"? Or does the identity of the party through the period depend on substantial sameness of membership, or upon substantial sameness of principles through the years, or upon some combination of characteristics?

It is respectfully submitted that the Constitution does not grant a right to participate in party procedure of a private nature, the existence of which depends upon the answer to be made to such fact questions.

CONCLUSION

The Attorney General of Texas submits that the basic principle announced in all the decisions of our courts relative to the conduct of primary elections by political parties to nominate candidates is that the party can regulate its policies, and determine who shall constitute its membership, unless specifically prohibited by statutory law.

In Texas the Legislature has passed laws to con-

trol the primary election in many respects. It has not, however, passed any law which in any way prevents the white Democrats or any other group of citizens from organizing a political party to nominate candidates for any or all offices to be voted upon in the general election.

The Attorney General of Texas prays that the judgment of the trial court and the Circuit Court be in all things affirmed.

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